



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for March 25, 2022

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BOARD DECISIONS

Appellant: Tahuana Bryant
Agency: Department of the Army
Decision Number: [2022 MSPB 1](#)
Docket Number: SF-315H-17-0558-I-1
Issuance Date: Mar. 24, 2022
Appeal Type: Probationary Termination

Jurisdiction

-- Probationers/5 U.S.C. § 7511(a)(1)(A)
---- National Defense Authorization Act of 2016

The agency appointed the appellant to a Nurse position, effective June 13, 2016. The original appointment SF-50 indicated that the appointment was subject to a 1-year probationary period. Several months later, the agency issued another SF-50, correcting the earlier one to instead indicate that the appointment was subject to a 2-year probationary period. In a June 9, 2017 letter, the agency terminated the appellant during her probationary period for failing to meet the conditions of her employment and delay in carrying out instructions. However, the agency did not effectuate the termination until July 10, 2017, which was more than 1 year, but less than 2 years, after her initial appointment.

The appellant filed an appeal challenging the termination. The administrative judge issued an initial decision that reversed the action because the appellant met the definition of an “employee” with chapter 75 Board appeal rights because she had completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less. The administrative judge further found that the agency did not provide the appellant with an opportunity to respond to the termination letter, which deprived her of due process. The agency filed a petition for review, arguing that the Board lacks jurisdiction over the appeal, and the appellant filed a response. The appellant also filed a “petition for enforcement,” which questioned whether the agency provided full interim relief.

Holding: The Board found that the agency submitted sufficient evidence of compliance with the interim relief order. The Board also found that the appellant was terminated during her 2-year probationary period, and it lacks jurisdiction over the appeal.

1. The Board denied the petition for enforcement because the Board’s regulations do not allow for a petition for enforcement of an interim relief order. The Board instead construed the appellant’s pleading as a challenge to the agency’s certification of compliance and addressed her argument that the agency should pay her back pay from the effective date of her termination. The Board noted that, when interim relief is ordered and a petition for review is filed, an agency is required to pay back pay and benefits from the date on which the initial decision was issued. Because the agency instructed the appellant to return to work effective on the date of the initial decision, the record contained an SF-52 reflecting her reinstatement on this same date, and the agency was processing her back pay and benefits at the time it filed its petition for review, the Board denied the appellant’s request for additional back pay and benefits.
2. The statute at 5 U.S.C. § 7511(a)(1)(A)(i)-(ii) states that an individual appointed to a competitive-service position is an employee with adverse action appeal rights if she “is not serving a probationary or trial period under an initial appointment” or “has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less.” On November 25, 2015, President Obama signed into law the National Defense Authorization Act for Fiscal Year 2016 (2016 NDAA), which added an exception to the definition of employee in 5 U.S.C. § 7511(a)(1)(A)(ii). Pursuant to the 2016 NDAA, 5 U.S.C. § 7511(a)(1)(A)(ii) defined a competitive-service employee with adverse action appeal rights as “an individual in the competitive service . . . except as provided in section 1599e of title 10, who has completed 1 year of current continuous service under

other than a temporary appointment limited to 1 year or less.” Section 1599e provided that, among other things, individuals appointed to a permanent competitive-service position at the Department of Defense (DOD) (including the Department of the Army) were subject to a 2-year probationary period and only qualified as an “employee” under 5 U.S.C. § 7511(a)(1)(A)(ii) (2016) if they completed 2 years of current continuous service.

3. The Board agreed with the agency that the administrative judge failed to recognize 10 U.S.C. § 1599e and the 2016 NDAA amendment to 5 U.S.C. § 7511(a)(1)(A)(ii). The appellant was not an employee with chapter 75 appeal rights because she was subject to a 2-year probationary period, and she had not yet completed a 2-year probationary period or 2 years of current continuous service in her competitive-service position when she was terminated. Therefore, her termination appeal was outside the Board’s jurisdiction.
4. The Board considered the appellant’s argument that the vacancy announcement and original appointment SF-50 showed that the position required only a 1-year probationary period, but it concluded that the statutes control the Board’s jurisdiction, not the agency’s misstatements. The appellant also stated no basis for invoking the Board’s limited regulatory jurisdiction over probationary terminations. In the absence of jurisdiction, the Board could not review whether the agency denied her due process.
5. The Board also noted that, on December 27, 2021, President Biden signed into law the National Defense Authorization Act for Fiscal Year 2022, which repealed the 2-year probationary period for DOD appointments made on or after December 31, 2022.

COURT DECISIONS

NONPRECEDENTIAL:

Reid v. Department of Transportation, Nos. [22-1132](#), 22-1133, 22-1135 (Fed. Cir. Mar. 24, 2022) (DC-531D-18-0039-I-5, DC-0752-16-0817-I-7, DC-0752-15-0922-I-8): The court dismissed the petition for review in these matters for failure to prosecute because Ms. Reid did not file the required Statement Concerning Discrimination and brief within the time permitted by the rules.

Oram v. Merit Systems Protection Board, No. [21-2307](#) (Fed. Cir. Mar. 23, 2022) (DC-1221-20-0444-M-1): Mr. Oram filed an individual right of action (IRA) appeal in which he alleged that the Department of the Air Force retaliated

against him for disclosing ongoing litigation against his former employer and used that information to deny his living quarters allowance, to refuse to extend his entrance-on-duty date, and to withdraw his job offer. The court affirmed the Board's conclusion that it lacks jurisdiction over the appeal. In pertinent part, the court found no error with the administrative judge's decision to forward Mr. Oram's Uniformed Services Employment and Reemployment Rights Act of 1994 claim to the regional office or the administrative judge's decision to require that Mr. Oram exhaust his administrative remedies regarding certain claims. The court also agreed with the administrative judge that Mr. Oram's disclosure was not protected because it did not allege that a Government official committed wrongdoing.

Hobson v. Merit Systems Protection Board, No. [21-1693](#) (Fed. Cir. Mar. 21, 2022) (CH-1221-20-0604-W-1): The court affirmed the Board's conclusion that it lacks jurisdiction over the IRA appeal because Mrs. Hobson failed to make a nonfrivolous allegation that her whistleblowing activity was a contributing factor in her nonselection for a middle school English teacher position. Importantly, Mrs. Hobson did not allege that the principal or anyone else was aware of her whistleblowing activity.

Poythress v. Department of Veterans Affairs, No. [20-1792](#) (Fed. Cir. Mar. 18, 2022) (AT-0714-19-0693-I-1): The parties moved to dismiss the appeal with prejudice pursuant to Fed. R. App. P. 42(b). The court granted the motion and dismissed the appeal as stipulated.

Jones v. Merit Systems Protection Board, No. [21-1254](#) (4th Cir. Mar. 18, 2022) (DC-1221-20-0667-W-2): The court affirmed the Board's decision to dismiss Mr. Jones's IRA appeal for lack of jurisdiction.